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## **Signposts and Crossroads: A Model for Live Action Mediator Assessment**

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### I. INTRODUCTION

A team of practitioners and scholars from the Institute for the Study of Conflict Transformation (ISCT) has been developing and testing performance-based approaches to mediator quality assurance<sup>1</sup> for a number

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<sup>1</sup> A wide variety of quality assurance processes have evolved in the mediation field. Professors Sarah Cole, Nancy Rogers, and Craig McEwen catalog a patchwork of processes in place in various jurisdictions throughout the country. These processes include entry-level qualifications based on educational degrees, training, or experience; performance-based standards; mediator liability and immunity schemes; certification and decertification schemes; codes of ethics; and regulatory approaches. SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY AND PRACTICE* §§ 11.2–11.6 (2d ed. 2001). Of these, only performance-based assessment directly addresses the *practice* competence of mediators—the ability to perform the role of mediator competently in the course of the unfolding interaction of a mediation session. Nonetheless, performance-based tests have

of years. Two noteworthy programs have resulted. First, a formative assessment or coaching process<sup>2</sup> for transformative mediators was created. In this process, a videotaped mediation session is replayed by the assessor in stop-action mode, and a coaching conversation is conducted by the assessor with the mediator. A variation on this process is conducting the coaching session as the mediator mediates in a role play, by stopping the role play action for analysis and coaching as needed. Later, a second process was developed as a result of interest on the part of mediation centers in tools that would facilitate assessment of a mediator's readiness to practice at a discrete point in time. This summative assessment process<sup>3</sup> involves an evaluation, at

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been viewed with suspicion by many in the mediation field for their inadequate conceptual and empirical basis, as well as their potentially hegemonic effect. *See, e.g.,* QUALIFICATIONS FOR DISPUTE RESOLUTION: PERSPECTIVES ON THE DEBATE (Catherine Morris & Andrew Pirie eds., 1994); Robert A. Baruch Bush, *One Size Does Not Fit All: A Pluralistic Approach to Mediator Performance Testing and Quality Assurance*, 19 OHIO ST. J. ON DISP. RESOL. 965 (2004) (analyzing the monolithic approach to qualifications which has characterized much of the work on performance-based standards in the mediation field); Dorothy J. Della Noce, *The Beaten Path to Mediator Quality Assurance: The Emerging Narrative of Consensus and its Institutional Functions*, 19 OHIO ST. J. ON DISP. RESOL. 937 (2004) (explaining how the monolithic assumptions identified by Professor Bush pervade the political processes through which standards for performance-based assessment are crafted).

<sup>2</sup> "Formative assessment" refers to a supportive process that is oriented toward the continued development of a learner. *See, e.g.,* James R. Antes & Judith A. Saul, *What Works in Transformative Mediator Coaching: Field Test Findings*, 3 PEPP. DISP. RESOL. L.J. 97 (2002) [hereinafter *What Works*]; James R. Antes & Judith A. Saul, *Evaluating Mediation Practice from a Transformative Perspective*, 18 MEDIATION Q. 313 (2001) [hereinafter *Evaluating*]; James R. Antes & Judith A. Saul, *Staying on Track with Transformative Practice: How Do We Know if Mediators Have Internalized the Framework?*, Presentation at the Hamline University Symposium on Advanced Issues in Conflict Resolution (Oct. 16–18, 1999), available at <http://www.transformativemediation.org/initiatives.htm> (last visited Oct. 15, 2006) [hereinafter *Staying*].

<sup>3</sup> "Summative assessment" refers to assessment performed at the conclusion of a course of instruction in order to determine whether the goals of instruction were met. *See* D. Royce Sadler, *Formative Assessment and the Design of Instructional Systems*, 18 INSTRUCTIONAL SCIENCE 119, 120 (1989). *See also* Northern Illinois University, *Assessment Terms*, [http://www.niu.edu/assessment/Resources/Assessment\\_terms.htm](http://www.niu.edu/assessment/Resources/Assessment_terms.htm) (last visited Oct. 15, 2006); David R. Carless, *Unleashing the Potential of Assessment for Learning*, Hong Kong Baptist University Symposium, Learning from the Past, Informing the Future: Education, Then, Now and Tomorrow (May 13–14, 2002).

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a later point in time, of a videotaped mediation session.<sup>4</sup> Together, these two programs provide rigorous, systematic mechanisms for supporting the development of transformative mediators and for assessing their readiness to practice. These two programs also provide conceptual guidance and practical models for performance-based assessment of mediators to the broader field of mediation.<sup>5</sup>

What has been lacking, however, in the mediation field generally as well as for the transformative framework in particular, is a rigorous and systematic process that can be used to assess mediator competence during live interaction. Such a process is desirable for many reasons. It could enable an assessor to provide immediate feedback to a mediator after a mediation session, thereby enhancing the mediator's learning. It could save mediators and mediation programs the investment of time and money required for creating and evaluating videotapes. It could also support the assessment of mediators who do not have access to the equipment and other resources necessary for creating videotapes. It could be less intrusive for the mediation participants and obviate any sense of fear that their interactions and images would be viewed by unknown others outside the mediation room. For all of these reasons, members of the ISCT mediator assessment team (the authors of this article) have been exploring possible models for live action assessment for some time. Development efforts were spurred in 2003, when the United States Postal Service (USPS) expressed a desire for an assessment process to be used in its REDRESS™ mediation program, in which an assessor could observe an actual mediation without interruption and provide helpful feedback to the mediator promptly upon the conclusion of the mediation, largely for formative purposes, without the aid of a videotape of the interaction. In response to this need we developed the Signposts and Crossroads model.

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<sup>4</sup> See Dorothy J. Della Noce et al., *Identifying Practice Competence in Transformative Mediators: An Interactive Rating Scale Assessment Model*, 19 OHIO ST. J. ON DISP. RESOL. 1005, 1005–58 (2004). This summative assessment process is being used by the ISCT for the certification of mediators who practice the transformative approach. Information on this certification program is available at <http://www.transformativemediation.org> (last visited Oct. 15, 2006). See Bush, *supra* note 1, at 1000–02 (describing this process as a "forward-looking example of what pluralistic performance testing might look like").

<sup>5</sup> See Bush, *supra* note 1, at 965 n.1 and accompanying text; Della Noce, *supra* note 1, at 963–64; Dorothy J. Della Noce et al., *Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy*, 3 PEPP. DISP. RESOL. L.J. 39, 59–65 (2002).

In this paper, we describe and explain the Signposts and Crossroads model—a performance-based approach that is directed toward the formative assessment of practice competence in mediators who follow the transformative framework.<sup>6</sup> We present the historical background of this project in Part II. In Part III, we articulate the conceptual foundations of the model. In Part IV, we provide an overview of the model. We conclude in Part V with a discussion of the implications of this model for the future of performance-based assessment initiatives in the mediation field generally. In particular, we discuss in that section the potential for this model to be adapted for live action assessment of mediators who orient to other frameworks for mediation practice.

## II. HISTORICAL BACKGROUND

The Signposts and Crossroads model is one product of a larger endeavor by the ISCT to develop approaches for supporting and assessing mediator competence in transformative practice. This work began as part of the Practice Enrichment Initiative (PEI), a multi-pronged theory-to-practice project led by Professors Robert A. Baruch Bush and Joseph P. Folger, which was jointly funded by the Hewlett Foundation and the Surdna Foundation.<sup>7</sup>

The PEI, which began in 1998 and ended in 2000, encompassed three work groups: one that focused on developing "pictures of practice" through close analysis of videotapes and transcripts of transformative mediation practice;<sup>8</sup> another that studied approaches to mediator development and

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<sup>6</sup> The transformative approach was articulated by Robert A. Baruch Bush and Joseph P. Folger. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* 12, 102–04 (1994) [hereinafter PROMISE I]; ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* (2d ed. 2005) [hereinafter PROMISE II]. PROMISE I introduced the transformative approach for the first time and PROMISE II presented a more fully developed articulation of its theoretical basis as well as a much more detailed description of specific practices to enact the model in mediation sessions.

<sup>7</sup> Robert A. Baruch Bush & Joseph P. Folger, *The Practice Enrichment Initiative 1998–2000 Final Report* (2001) (on file with lead author).

<sup>8</sup> To date, this project has resulted in the production of two commercially-available videotapes: *The "Purple" House Conversations* and the recently released *Pictures of Transformative Mediation: Family Ties*. Institution for the Study of Conflict Transformation, Inc., <http://www.transformativemediation.org/publications.htm#Videos> (last visited Jan. 9, 2007). *The "Purple" House Conversations* has been the subject of detailed analysis. See PROMISE II, *supra* note 6, at 131–214; Ran Kuttner, *Striving to Fulfill the Promise: The Purple House Conversations and the Practice of Transformative Mediation*, 22 NEGOT. J. 331 (2006). *The "Purple" House Conversations* videotape was

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assessment;<sup>9</sup> and a third that analyzed policy materials in the mediation field to assess their impact on the opportunity to engage in transformative practice and to develop appropriate alternatives where necessary.<sup>10</sup> Among the many products of the PEI were: (1) recognition of the power of policy materials, such as assessment standards and procedures, to shape practice; (2) crystallization of tangible images of competent transformative practice; and (3) creation of thoughtful approaches and materials for *formative assessment*—a supportive, developmental approach to building mediator competence in the transformative model.<sup>11</sup>

During this same time period, members of the ISCT were actively engaged in the education and training of mediators, as they continue to be today. A significant component of these training programs involved ongoing assessment of the practices of mediators during the training process in order to determine those areas where adequate learning was demonstrated, as well as those areas where additional instruction was needed. This assessment was conducted through close analysis of the mediators' interactions in mediation simulations. Eventually, to meet the demand for training beyond the introductory level, members of the ISCT developed this process into an advanced tutorial training (also known as a coaching process) that utilized close analysis with mediators of videotaped interactions of those mediators in mediation simulations. This training process was developed in tandem with the work of Professor James R. Antes and Judith A. Saul on formative assessment.<sup>12</sup>

Upon the conclusion of the PEI, we turned our attention to *summative assessment*; that is, a summary evaluation at a specific point in time of a mediator's competence in transformative practice.<sup>13</sup> Because our interest was

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also featured in three workshops led by Frank Sander and Ran Kuttner for the Harvard Program on Negotiation in March 2006. See Harvard Law School Program on Negotiation, *The Dispute Resolution Forum*, [http://www.pon.harvard.edu/news/2006/dr\\_f\\_purple\\_house.php](http://www.pon.harvard.edu/news/2006/dr_f_purple_house.php) (last visited Oct. 15, 2006).

<sup>9</sup> Among the products that emerged from this initiative were *What Works*, *supra* note 2; *Evaluating*, *supra* note 2; and *Staying*, *supra* note 2.

<sup>10</sup> Examples of publications that emerged from this initiative include Della Noce et al., *supra* note 5; Bush, *supra* note 1; and Della Noce, *supra* note 1.

<sup>11</sup> See *What Works*, *supra* note 2; *Evaluating*, *supra* note 2; *Staying*, *supra* note 2.

<sup>12</sup> See *What Works*, *supra* note 2; *Evaluating*, *supra* note 2; *Staying*, *supra* note 2.

<sup>13</sup> It is worth noting that the summative assessment work of the ISCT was and is motivated by a variety of concerns. First, there is a desire to be responsive to and support the many program administrators who have consistently voiced a need for summative

in practice competence, we explored performance-based assessment methods. We looked critically at what had already been attempted in the field, considered the concerns voiced by various scholars and practitioners, and sought to develop a process that addressed those concerns.<sup>14</sup> In the process, we brought together the insights from the PEI project, our experiences with training and coaching, and new insights from empirical research on the discourse of competent transformative mediators.<sup>15</sup> At the 2002 Symposium of the ISCT, entitled "Assuring Mediator Quality: What are the Alternatives?" at the University of Maryland School of Law in Baltimore, Maryland, we presented a Provisional Summative Assessment Process<sup>16</sup> and invited public comment. Participants at the Symposium were generous with their comments, insights, and suggestions.<sup>17</sup> Following the

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assessment approaches to support their own local quality control efforts. Second, there is a need to protect the integrity of the transformative model and minimize the potential for confusion among various models by providing a means for assessing whether practitioners and programs going by the name "transformative" are truly engaged in transformative practice. The third concern is related to the second: providing a way to assess whether mediators are actually engaged in transformative practice supports the possibility of valid and reliable research into the effects of transformative mediation. Fourth, there is a desire to protect the ability of mediators to use the transformative model by offering an assessment alternative for those programs that are currently using assessment processes based solely on the problem-solving model. While the developers and administrators of such programs may not intend to exclude transformative mediators from their ranks, they sometimes exclude transformative mediators nonetheless because they adopt assessment processes that capture only problem-solving competencies. Bush, *supra* note 1. Finally, the ISCT cooperates with various organizations that seek access to a roster of mediators who are competent in the transformative approach. It is within the ISCT mission of supporting the field, and mediators who wish to engage in transformative practice, to develop and maintain such rosters. This requires a thoughtful process for determining practice competence.

<sup>14</sup> See *supra* note 1 and accompanying text; Della Noce et al., *supra* note 4.

<sup>15</sup> See Dorothy J. Della Noce, *Ideologically Based Patterns in the Discourse of Mediators: A Comparison of Problem Solving and Transformative Practice* (Apr. 3, 2002) (unpublished Ph.D. dissertation, Temple University) (UMI Dissertation Service, 2002).

<sup>16</sup> See Dorothy J. Della Noce et al., *Identifying Competence in Transformative Mediators: A Provisional Summative Assessment Process*, Presentation for the 2002 Symposium of the Institute for the Study of Conflict Transformation (Dec. 8–9, 2002) (on file with lead author).

<sup>17</sup> We thank all who have contributed to the development of this project, including our colleagues at the ISCT and the participants at the Symposium.

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Symposium, we made a number of revisions to the model and tested it for reliability. In the spring of 2003, the ISCT launched a performance-based mediator certification program utilizing the Interactive Rating Scale Assessment.<sup>18</sup>

For formative assessment purposes, assessment of the quality of mediator interaction in a mediation could be performed either by reviewing and analyzing a videotaped mediation session (an actual mediation or a role play<sup>19</sup>) at some point in time after the completion of the videotaping, or by reviewing and analyzing a mediation role play by stopping and starting the action and thereby creating breaks for a coaching conversation. For a number of reasons, only videotaped mediation sessions have been used for summative assessment purposes. The use of videotape provides a certain amount of confidence in the assessment processes. Videotape furnishes the assessors with a tangible record of the interaction that can be analyzed carefully and methodically, rewound, replayed, transcribed, and discussed with colleagues. Each of these processes, then, relied on an analysis conducted "outside" the "real time" of the mediation session, either by relying on videotape or relying on stop-action techniques. These processes begged the question of whether a similarly rigorous method could be developed for the contemporaneous assessment of an actual mediation session in real time and without interrupting the flow of the session itself.

Historically, contemporaneous, real-time assessment of mediators has relied upon the use of behavioral checklists.<sup>20</sup> The typical checklist is structured as a simple list of behaviors that are checked off—in yes/no

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<sup>18</sup> See Della Noce et al., *supra* note 4, at 1036–46. Information on the ISCT Certification Program can be found at <http://www.transformativemediation.org> (last visited Oct. 15, 2006).

<sup>19</sup> For the Interactive Rating Scale Assessment, Della Noce et al. approved the use of unscripted, unrehearsed role plays or simulations, given the assumptions about the nature of communication on which their project was based. Della Noce et al., *supra* note 4, at 1038 n.113. They noted that, even in a role play or simulation, each participant can still be assumed to be constructing his or her discourse in a tentative, strategic, real-time fashion, toward the accomplishment of specific goals, in the context of the unfolding interactions among every participant. The use of role play or simulations for the assessment of communication competence is an accepted part of clinical education in fields such as medicine and law. See, e.g., Karen Barton et al., *Valuing What Clients Think: Standardized Clients and the Assessment of Communicative Competence*, 13 CLINICAL L. REV. 1, 1–6 (2006).

<sup>20</sup> See Bush, *supra* note 1.

fashion—as they occur.<sup>21</sup> It is useful for recording whether certain discrete behaviors have occurred and if so, with what frequency.<sup>22</sup> Checklists, however, are problematic for the assessment of complex, situated interaction such as a mediator's interaction with clients. The very construction of checklists implies that certain behaviors by the mediator are deemed competent simply for occurring, regardless of the context of prior moves by the mediator and the parties. Yet it is fairly obvious to most astute assessors that the mere performance of a behavior says nothing about the appropriateness or responsiveness of that behavior in a particular context. Moreover, checklists do not foster inquiry into the meaning of a particular intervention or its effects on the unfolding interaction.

Hence, with the request of the USPS, our challenge was to go beyond the checklist and design a context-sensitive process for live action mediator assessment. To do this, we carried the insights from our prior projects on performance-based mediator assessment into a new phase of development. We built upon the basic conceptual framework constructed for the Interactive Rating Scale Assessment,<sup>23</sup> and considered how this framework could be adapted to meet the challenges of live action assessment. In the next section we present the conceptual framework that emerged.

### III. THE CONCEPTUAL FRAMEWORK

We have presented in several earlier articles critical analyses of performance-based assessment initiatives in the mediation field.<sup>24</sup> From our analyses we identified three key deficiencies in the early attempts at establishing performance-based assessment methods that we believe generated valid criticism: inadequate theoretical grounding, inadequate empirical grounding, and inadequate methodological grounding.<sup>25</sup> We concluded that performance-based assessment methods should be supported by an articulation of the theoretical, empirical, and methodological principles on which they are based.<sup>26</sup> In this section we articulate those principles.

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<sup>21</sup> See PATRICIA CRANTON, *PLANNING INSTRUCTION FOR ADULT LEARNERS* 199 (2d ed. 2000). For examples of tests in this mode, see Bush, *supra* note 1, at 976–77.

<sup>22</sup> CRANTON, *supra* note 21, at 199–200.

<sup>23</sup> Della Noce et al., *supra* note 4. See *infra* text accompanying notes 24–61.

<sup>24</sup> See Bush, *supra* note 1; Della Noce, *supra* note 1; Della Noce et al., *supra* note 4. See also Robert A. Baruch Bush, *Mixed Messages in the Interim Guidelines*, 9 NEGOT. J. 341 (1993).

<sup>25</sup> Della Noce et al., *supra* note 4, at 1013–17.

<sup>26</sup> Della Noce et al., *supra* note 4, at 1017.



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### A. Theoretical Foundation

An articulated theoretical framework is essential to the construction of performance-based competency assessments for mediators. Theory shapes practice. That is, the theoretical framework establishes the definition of success for the mediator, which in turn shapes the mediator's ideas of good practice and bad practice.<sup>27</sup> Because definitions of success vary widely according to the theoretical framework followed,<sup>28</sup> a single set of standards cannot be designed to capture competent practice at a meaningful behavioral level for all mediators, across diverse frameworks.<sup>29</sup> In fact, there is empirical evidence that the very actions that are defined as "good practice" for mediators oriented to one framework are considered "bad practice" for mediators oriented to a different framework.<sup>30</sup>

In other words, practice competence is framework-specific.<sup>31</sup> Moreover, one of the key insights from the PEI project was that, even when there is no articulated theoretical framework, theoretical assumptions about the nature of "good practice" and "good outcomes" still emerge through the language of the assessment standards themselves.<sup>32</sup> Thus, even in the absence of a clearly articulated theoretical framework, performance-based assessment initiatives will have, to the extent that they are applied broadly, the consequence of imposing one framework for "good" practice.<sup>33</sup> For those who understand

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<sup>27</sup> Descriptions of three different theoretical frameworks that shape mediation practice in profoundly different ways, namely the problem-solving framework, the transformative framework, and the harmony framework, are offered by PROMISE I, *supra* note 6, at 59–63, 191–208, 239–41. *See also* Joseph P. Folger & Robert A. Baruch Bush, *Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13 *MEDIATION Q.* 263, 263–76 (1996).

<sup>28</sup> PROMISE I, *supra* note 6, at 94–95.

<sup>29</sup> Bush, *supra* note 1; Della Noce, *supra* note 15, at 335–36.

<sup>30</sup> Della Noce, *supra* note 15, at 198–304.

<sup>31</sup> Della Noce, *supra* note 15, at 333–36.

<sup>32</sup> *See, e.g.*, Bush, *supra* note 1 (analyzing the theoretical models that informed earlier attempts at setting standards for performance-based quality assurance measures); Michelle LeBaron Duryea, *The Quest for Qualifications: A Quick Trip Without a Good Map*, in *QUALIFICATIONS FOR DISPUTE RESOLUTION: PERSPECTIVES ON THE DEBATE* 109, 113–18 (Catherine Morris & Andrew Pirie eds., 1994) (analyzing the theoretical model underlying the work of the Test Design Project). *See generally* Della Noce et al., *supra* note 5, at 61–65 (analyzing the role of theoretical clarity in mediation practice and policymaking).

<sup>33</sup> *See* Bush, *supra* note 1, at 968–1001.

that there are different forms of mediation practice, the standardizing effect is seen as hegemonic.<sup>34</sup> This difficulty can be overcome if the theoretical framework is explicitly articulated. In other words, as ironic as this may sound, by clearly articulating the goals and practices of specific frameworks for purposes of assessment (and thereby emphasizing differences rather than commonality), the diversity of practices in the mediation field can be honored and inclusivity, rather than exclusivity, can be achieved.

The Signposts and Crossroads model we present here is specifically grounded in the transformative framework.<sup>35</sup> In the transformative framework, mediation is a process in which a neutral third party works with parties in conflict to help them change the quality of their conflict interaction from negative and destructive to positive and constructive, by supporting party efforts at empowerment and recognition shifts.<sup>36</sup> In this approach, "success" in mediation is expressed as "shifts" in the quality of the human conflict interaction in the room, rather than the achievement of an agreement per se or any particular terms of agreement.<sup>37</sup> This vision of success shapes mediation practice in unique ways.<sup>38</sup> A competent transformative mediator practices with a *microfocus*, identifying opportunities for empowerment and recognition shifts as those opportunities appear in the parties' own conversations, and responding in ways that provide an opening and support for parties to choose what, if anything, to do with them.<sup>39</sup> Therefore,

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<sup>34</sup> See Duryea, *supra* note 32, at 109–10 (expressing concern that the push for qualifications and standards in the mediation field will lead to "replication of the status quo where processing of disputes is carried out primarily by dominant culture professionals according to dominant culture, middle class values"); Eric B. Gilman & David L. Gustafson, *Of VORPs, VOMPs, CDRPs and KSAOs: A Case for Competency-Based Qualifications in Victim Offender Mediation*, in QUALIFICATIONS FOR DISPUTE RESOLUTION 89, 93–94 (arguing that the process of establishing mediator qualifications is extending the hegemony of the legal system, and the "white male lawyers" who have become legislators and judges).

<sup>35</sup> See generally PROMISE I, *supra* note 6; PROMISE II, *supra* note 6.

<sup>36</sup> See PROMISE I, *supra* note 6, at 84–89; PROMISE II, *supra* note 6, at 45–72; Folger & Bush, *supra* note 27, at 266–67. See also Robert A. Baruch Bush & Sally Ganong Pope, *Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation*, 3 PEPP. DISP. RESOL. L.J. 67, 86–95 (2002).

<sup>37</sup> See PROMISE I, *supra* note 6, at 84; PROMISE II, *supra* note 6, at 59–72; Folger & Bush, *supra* note 27, at 266–67. See also Bush & Pope, *supra* note 36, at 77–85; Della Noce, *supra* note 15, at 172–97.

<sup>38</sup> See Della Noce, *supra* note 15, at 172–97, 251–304.

<sup>39</sup> See PROMISE I, *supra* note 6, at 84; PROMISE II, *supra* note 6, at 215.

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competence in transformative mediation—the ability to act consistently and reflectively in a way that supports the parties' efforts at conflict transformation—is a function of the mediator's understanding of the theoretical foundations of the process, and his or her ability to enact that understanding in the context of unfolding conflict interaction.<sup>40</sup>

The goal of an assessment process for transformative mediation is to seek evidence of how well the mediator has learned and internalized the approach, to the end that the mediator can apply it to specific situations, and ultimately demonstrate appropriate behavior in practice.<sup>41</sup> This requires both performance testing and an analysis of the mediator's theoretical understanding. For the performance-based dimension of competency assessment, a systematic approach to observation and analysis of interaction is essential. At the same time, analysis of the mediator's theoretical understanding can be accomplished through an *assessment conversation* between the assessor and the mediator. An assessment conversation will provide insight on the mediator's situated understanding of the model and ability to apply the model in specific situations, as well as insight on the likelihood that the mediator will be able to engage in competent practices with some consistency over time.

Because our theoretical foundation is transformative mediation, we make no claim that the performance-based assessment standards we set forth can or should be generalized to all mediators.<sup>42</sup> We are very clear that we are assessing only competence in transformative practice. A mediator who does not demonstrate competence according to the standards of the Signposts and Crossroads model could very well be competent in other forms of mediation. Theoretical clarity has the added benefit, then, of recognizing the diversity of the mediation field, and freeing our approach of the universalizing and potentially hegemonic impact of prior models for assessment. At the same time, by making our approach theory-specific, we enhance its validity, by tying competent mediator practices at the behavioral level with a specific definition of mediator success and empirical evidence of "good practice" within that single framework.

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<sup>40</sup> See *Evaluating*, *supra* note 2, at 315–23.

<sup>41</sup> See *Evaluating*, *supra* note 2, at 319; *Staying*, *supra* note 2, at 5.

<sup>42</sup> We do suggest that the *method* used for developing and implementing this assessment model can be applied to other forms of mediation. See *infra* Section V.

### B. Empirical Foundation

We developed this model using two types of empirical evidence from systematic observations of what competent transformative mediators actually do, and don't do, in mediation. First, we drew upon what might be called the "participatory action research"<sup>43</sup> conducted by members of the ISCT since the time of the PEI—the analysis of videotapes and transcripts of mediation sessions, as well as close coaching work with mediators on the nature and effects of their discourse moves at a micro-level. Second, we drew upon discourse analytic research conducted by Della Noce, who compared the practices of prominent problem-solving mediators with the practices of prominent transformative mediators, and thereby isolated essential and unique discursive practices of transformative mediators.<sup>44</sup>

Della Noce identified five "discourse strategies"<sup>45</sup> used by the transformative mediators in her study that were not used by the problem-solving mediators, as well as various micro-level mediator moves that made up those strategies.<sup>46</sup> We continued to refine and build on the findings of this research by analyzing additional videotapes of mediations representative of each framework and comparing the patterns of practice we found with those identified in the original research. Ultimately, we defined certain patterns of practice of competent transformative mediators as the basis for the Interactive Rating Scale Assessment.<sup>47</sup>

The same empirically-derived patterns of practice that shaped the Interactive Rating Scale Assessment informed the development of the Signposts and Crossroads model. However, we had to confront the unique character of real-time live action assessment as we considered how these patterns of practice would be used. First, real-time live interaction moves rapidly. Speech alone outpaces one's ability to manually record what is said,

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<sup>43</sup> See Stephen Kemmis & Robin McTaggart, *Participatory Action Research*, in HANDBOOK OF QUALITATIVE RESEARCH 567, 593, 595–98 (Norman K. Denzin & Yvonna S. Lincoln eds., 2d ed. 2000) (describing participatory action research as a collaborative, recursive, critical, and practical social process through which participants in any form of social practice aim to transform both theory and practice by examining what the nature of social practice is, how social practice is shaped, and how social practice can be transformed through collective action).

<sup>44</sup> Della Noce, *supra* note 15, at 198–304.

<sup>45</sup> Discourse strategies are recurrent patterns of mediator moves in interaction that braid together over time into meaningful units. Della Noce et al., *supra* note 4, at 1022.

<sup>46</sup> Della Noce, *supra* note 15, at 251–304.

<sup>47</sup> Della Noce et al., *supra* note 4, at 1022–36.

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and that difficulty is compounded when paralinguistic and nonverbal features of communication are added. Second, live interaction is messy. People interrupt, talk over one another, and speak in barely audible tones at times. People make mistakes and repair those mistakes. Third, live interaction is indeterminate. It is a tentative, context-bound, co-constructed, meaning-making process. The meaning of an utterance is not apparent on its face, but depends on what is said, how it is said, how it is received, what has gone before, and what responses it brings forth.

These observations about the nature of live interaction frame the difficulties of assessing mediator performance in live interaction. Assessors cannot accurately transcribe the precise verbal and nonverbal dimensions of an interaction as they observe it. Assessors cannot capture every verbal and nonverbal nuance of an interaction as that interaction unfolds in real time. Assessors cannot determine the meaning of an utterance from any single utterance itself. Assessors can take notes to memorialize the interaction while observing it, but of necessity, those notes will be an incomplete, interpretive, and subjective record of the actual interaction. They will be the functional equivalent of ethnographic field notes.<sup>48</sup>

### 1. *The "Signpost" Events*

With the recognition of how the unique character of live interaction would affect assessment efforts came the realization that we could most usefully facilitate the assessment of live interaction by providing a structure for observation that focused the assessor's attention on those behaviors that were particularly diagnostic of competence in the transformative framework. We reasoned from our prior work that there are certain *critical moments*<sup>49</sup> in

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<sup>48</sup> Ethnography is a tradition of qualitative research in which the researcher immerses himself or herself in a cultural setting, often in the role of participant-observer, in order to observe the behavior of participants, understand their meaning-making processes, and describe how local meaning and the broader culture are constructed. The ethnographer typically makes contemporaneous notes of his or her observations while in the field, called field notes, to facilitate later analysis. Ethnography can be a form of applied research, that is, research that helps people make decisions. See Erve Chambers, *Applied Ethnography*, in *HANDBOOK OF QUALITATIVE RESEARCH* 851, 851–67 (Norman K. Denzin & Yvonna S. Lincoln eds., 2d ed. 2000).

<sup>49</sup> This concept of "critical moments" is important in the history of the development of the transformative framework. Bush and Folger introduced it in 1994. See PROMISE I, *supra* note 6. It has been a component of mediator training in the transformative model since the time of the Training Design Consultation Project. See Joseph P. Folger & Robert A. Baruch Bush, *Developing Transformative Training: A View from the Inside*, in

the course of interaction in a mediation session at which the mediator's choice of responsive move would indicate whether the mediator was oriented to the goals and principles of transformative mediation or to the goals and principles of another approach to mediation.<sup>50</sup> Hence, we made the decision that assessors should focus on certain events in the mediation where key opportunities for empowerment or recognition shifts are likely to arise,<sup>51</sup> and where intervention might be especially helpful to supporting the parties' efforts at empowerment and recognition shifts. We called these critical moments "signpost" events.<sup>52</sup>

Building on our insights from research and training on transformative practice, and especially on the insights we gained by reviewing mediators' videotapes using the Interactive Rating Scale Assessment, we identified five<sup>53</sup> important signpost events that are likely to occur in the course of a mediation session:

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DESIGNING MEDIATION: APPROACHES TO TRAINING AND PRACTICE WITHIN A TRANSFORMATIVE FRAMEWORK 168, 171–72 (Joseph P. Folger & Robert A. Baruch Bush eds., 2001). In addition to requiring mediators in training to role play an entire mediation, it is standard practice in transformative mediation training to center role play practice on mediator interventions at particular "critical points" in the interaction.

<sup>50</sup> Mediator "moves" are defined as how a mediator structures *his or her turn* in the interaction, *in response to preceding interactions*, by constructing one or more means of intervention in context. Della Noce et al., *supra* note 4, at 1022.

<sup>51</sup> See PROMISE I, *supra* note 6, at 201–08; PROMISE II, *supra* note 6, at 110–11. See also Janet Kelly Moen et al., *Identifying Opportunities for Empowerment and Recognition in Mediation*, in Folger & Bush, *supra* note 49, at 112–32; Erling O. Jorgensen et al., *Microfocus in Mediation: The What and How of Transformative Opportunities*, in DESIGNING MEDIATION: APPROACHES TO TRAINING AND PRACTICE WITHIN A TRANSFORMATIVE FRAMEWORK 133 (Joseph P. Folger & Robert A. Baruch Bush eds., 2001).

<sup>52</sup> It is important to caution readers that the descriptions of the Signposts, and the appropriate path to be taken at the Crossroads each presents, are not offered as shorthand for training or practice in the transformative approach. The Signposts and Crossroads are simply select "diagnostic" events within a larger scheme of practice that is embedded in a particular ideology, theory, goals, and principles, and that is best understood in that context.

<sup>53</sup> From our analysis of data and the literature, we originally identified fifteen to twenty events which could be considered critical moments and therefore signpost events. However, we narrowed these events to the five described here largely for two reasons. First, five events seemed optimum for the assessor's attention capacity and the ultimate usability of the method. Second, the five events selected were identified as particularly

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1. The opening of the session
2. A party narrative
3. Attempts at direct party-to-party engagement
4. "Conflict talk"<sup>54</sup>
5. Process choice points

These signpost events mark moments in the interaction where opportunities for empowerment or recognition shifts are most likely to be encountered, and where the mediator's choice of move will be particularly telling in terms of competence in the transformative model of practice.

The first identified signpost is the *opening of the session*. The opening provides an opportunity to discuss how mediation offers the parties opportunities for empowerment and recognition, and also to attend to the expressed concerns of the parties. The opening of mediation is very revealing with respect to the practice orientation of the mediator. Almost every key strategy of transformative practice can be identified in the opening moments, and this often establishes relatively stable interaction patterns for the remainder of the mediation.<sup>55</sup>

The second identified signpost event, a *party narrative*, refers to an attempt by a party to tell a story—generally a story about what the situation is or what it has meant to that party or what one or the other party has done. Narratives may occur at any point during a mediation session. Narratives may contain descriptions of what happened, explanations or justifications of past behavior, attributions about the behavior or motivations of the other

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likely to occur in most mediations and particularly telling of a mediator's competency level.

<sup>54</sup> The term "conflict talk" is taken from *CONFLICT TALK: SOCIOLINGUISTIC INVESTIGATIONS OF ARGUMENTS IN CONVERSATIONS* (Allen D. Grimshaw ed., 1990). We use it here to refer to the speech activity of verbal conflict, in which the parties "oppose the utterances, actions, or selves of one another," either through direct engagement between the parties, or through one party's construction of an opposition with the other in a single turn at talk. The key to recognizing conflict talk is its oppositional character. See Della Noce, *supra* note 15, at 207–08 (extending Samuel Vuchinich, *The Sequential Organization of Closing in Verbal Family Conflict*, in *CONFLICT TALK: SOCIOLINGUISTIC INVESTIGATIONS OF ARGUMENTS IN CONVERSATIONS* 118 (Allen D. Grimshaw ed., 1990)).

<sup>55</sup> See Della Noce, *supra* note 15, at 251–80. See also Folger & Bush, *supra* note 27, at 266 (noting that "[t]he opening statement says it all"); Sally Ganong Pope, *Inviting Fortuitous Events in Mediation: The Role of Empowerment and Recognition*, 13 *MEDIATION Q.* 287, 290–92 (1996) (explaining the importance of the opening statement in divorce mediation).

party, and descriptions of the impact of the conflict on the party's life. Narratives may be articulate and well-organized, with a recognizable beginning, middle and end, or they may be rambling, muddled and confused. They may be long or relatively short.

The third identified signpost event, *attempts at direct party-to-party engagement*, also can occur at any point during a mediation session. Attempts at direct party-to-party engagement can usually be recognized by a shift—either verbally, as in the shift from a party talking in the third person (talking *about* the other party, or "he/she-talk") to talking in the second person (talking *to* the other party, or "you-talk"), or nonverbally, as in the shift from a party facing the mediator to facing the other party.

The fourth identified signpost event, *conflict talk*, can be recognized by its oppositional quality ("opposed to," that is, against, hostile or contrary).<sup>56</sup> Conflict talk frequently tends to be heated, emotional (e.g., angry, sarcastic, icy), and full of attribution and blame. It can be either directed toward the other party (direct engagement) or addressed to the mediator about the other party. This, too, can occur at any point in a mediation session.

The fifth identified signpost event, *process choice points*, refers to moments in the mediation when it is clear that there are choices to be made about how to proceed next. These moments might appear as direct requests in the parties' own talk, be implied from questions or objections that a party raises about the process, or emerge from a period of discussion that appears to be "recycling" or has "stalled out." This, too, can occur at any point in a mediation session.

## 2. From Signposts to Crossroads

Each of these signpost events confronts the mediator with a "crossroads," a point at which the mediator may choose an intervention that is compatible with the transformative orientation or one that is not supportive of the orientation, and if compatible, that executes the intervention with a reasonable degree of skill. An assessor can discriminate whether a mediator is engaged in competent transformative practice or not by evaluating the mediator's choices at these crossroads. By way of brief example, the

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<sup>56</sup> It is important to note that the term "oppositional" is used to refer to party behavior toward the other party, not party behavior toward the mediator. See also *supra* note 54.



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following illustrations are offered. A summary of these Signposts and Crossroads in table form is presented in Appendix A.<sup>57</sup>

The *opening of the mediation* presents the mediator with important choices about how to frame mediation. When opening the session, competent transformative mediators generally orient the parties to the process by emphasizing the opportunities for empowerment and recognition shifts that can arise in the process, using plain language. Transformative mediators take a party-centered focus from the outset, particularly by framing mediation as the parties' conversation, subject to the parties' own choices. They use the metaphor of "constructive conversation" as a way to describe the mediation process. They use words like "conversation," "discussion," "chat," and "talk" to describe what happens in mediation. They highlight the many possible constructive outcomes of the mediation conversation, as opposed to emphasizing agreement alone.

When a party is *constructing a narrative*, the mediator is presented with choices about whether and how to support the construction of that narrative. Competent transformative mediators generally try to support the party's efforts at self-empowerment, as well as the possibility of inter-party recognition, by helping that party clarify his or her own meaning, and bring that meaning more fully "into the room." They encourage the party to speak as long as the party chooses. They offer reflections to the party, to help the party clarify, organize, and strengthen the party's voice. The reflections are directed toward the speaking party. The reflections "follow" the content and emotional tone of the party's own comments. Finally, the reflections are offered in a tentative manner that invites the party to correct the mediator, especially by using "check ins" at the end or ending with an opening, questioning tone (known as "open reflections").

When a party *attempts to engage directly with the other party*, the mediator is presented with choices about whether and how to support that engagement. Transformative mediators recognize that when a party attempts to engage directly with another party, it is an act of empowerment that should be supported, and also that direct engagement can provide a foundation for the possibility of inter-party recognition (new understandings). Therefore, competent transformative mediators will generally try to support this engagement through pro-active listening, supporting significant segments of uninterrupted party-to-party talk by staying out of the interaction or deferring the opportunity to speak ("intentional silence"), and following party-to-party discussions with summaries. They address the summaries to both parties;

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<sup>57</sup> Definitions, elaborations and sources for the terms used in Appendix A and in this section can be found in Della Noce et al., *supra* note 4.

include the topics raised by all parties; include the emotional tone conveyed by the parties; include and highlight points of disagreement, not just points of agreement; and include the intangible as well as the tangible.

"*Conflict talk*" is the kind of talk one would expect to hear from parties in conflict; it is oppositional, that is, something in the talk directly opposes the story, experience, interpretations, avowed good intention, or identity of the other party. Conflict talk may consist of a series of opposing exchanges between parties or a single party describing the other in oppositional terms. Conflict talk presents the mediator with choices about whether and how to support such talk. In the transformative framework, conflict talk is important because it is as the conflict unfolds in the room that parties can learn new information, present themselves in new ways, create new understandings, and make informed decisions. Therefore, it is not suppressed, reframed, sanctioned or redirected. Because the capacities for decisionmaking (empowerment) and interpersonal understanding (recognition) are built through conversation, transformative mediators allow conversation to happen, even when it gets hot. They "follow the heat" by using key word encouragers (that is, keying in to a term a party used that seems to carry "heat"), by using reflections or summaries, and by asking questions that invite elaboration of conflict storylines.

Finally, *process choice points* are very revealing of mediator orientation and competence, as they challenge the mediator to grapple with who really owns the process. For the transformative mediator, the emphasis on party empowerment requires that the mediator highlight all possible choices that arise in the session, offer them to the parties, and avoid the temptation to preempt party choices. Transformative mediators understand that "process" and "content" are inherently linked, and offer available choices about both to the parties in order to avoid undue influence on the outcome. Therefore, they highlight process choice points that appear as direct party requests or as implied in party questions about or objections to any aspect of the process. They offer process choice points to the parties. When discussion appears to "recycle" or "stall," they offer a summary, to "hold up" the conversation to the parties, so they can reflect upon it and consider what, if anything, to add, correct, clarify, organize differently, or change. The summary is followed by a check in with the parties for their thoughts on what to do and where to go next. Mediators offer any mediator suggestions only tentatively, and often with alternatives, in order to emphasize opportunity for party choice.

In summary, the Signposts and Crossroads Model highlights certain events in the mediation session as presenting the mediator with a choice of interventions, and describes the choices mediator make at these crossroads as particularly diagnostic of competent transformative mediation practice. In the

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next section, we discuss how these signposts and crossroads are incorporated into an assessment methodology.

### *C. Methodological Foundation*

Because any attempt to assess mediator practice is the assessment of communication, with potentially serious consequences for the mediator, methodological grounding is essential. Competence cannot be merely in the eye of the beholder. As we noted in an earlier article,<sup>58</sup> the credibility of performance-based testing is enhanced when the process includes (1) building on a coherent perspective on the phenomenon of human communication that accounts for the "interactive and social nature of communication"<sup>59</sup> by capturing the contextualized nature of mediator communication; (2) using a methodologically sound approach to collecting, coding and analyzing communication data; and (3) taking into account the mediator's own interpretations of the nature, purpose, and effect of his or her moves on the ongoing interaction. We address each of these factors in the paragraphs that follow.

Our work continues to reflect the *discourse analytic perspective* on communication.<sup>60</sup> By way of the briefest summary, the discourse analytic perspective treats human communication as a complex social interaction: multi-functional, goal-directed, context-sensitive, tentative, patterned, interpretive, and socially constructed, with important and far-reaching social consequences. It should be apparent that this perspective takes context seriously and does not support the assumption that an observer can simply "read off" a single meaning, purpose, or function from a sample of mediator discourse.<sup>61</sup> Our methodology builds on this perspective by being context-sensitive, in that it evaluates mediator moves in context.

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<sup>58</sup> Della Noce et al., *supra* note 4.

<sup>59</sup> See National Communication Association, *Criteria for Assessment of Oral Communication*,

<http://www.natcom.org/Instruction/assessment/Assessment/CriteriaAssessment.htm> (last visited Feb. 7, 2004) (describing criteria for the assessment of oral communication in K-18 education programs).

<sup>60</sup> Della Noce et al., *supra* note 4, at 1020. This perspective has a rich and complex history that is beyond the scope of this article. See Della Noce, *supra* note 15, at 76-87 (elaborating on this perspective and providing a concise review of the primary literature).

<sup>61</sup> Such an assumption typically underlies checklist approaches to mediator assessment.

The basic approach to collecting data for the performance component of the assessment is the creation of field notes. The assessor pays close attention to the unfolding interaction, records those exchanges where a signpost appears, and notes the mediator's choice of intervention at that signpost. Upon the conclusion of the mediation session, the assessor codes and analyzes the assessor's field notes. The data collection, coding and analysis of the performance component are supplemented with an assessment conversation. Because our perspective emphasizes the contextualized and interpretive nature of meaning in communication, we continue to take care to temper the assessor's interpretation of practice competence with the interpretations of the mediator.<sup>62</sup> It is important to bring the mediator's voice into the assessment process in order to tap into the situated knowledge and values of the mediator, as well as how the mediator reads the unfolding context of the session, in order to build a nuanced interpretation of competence.

In summary, the following principles underlie the Signposts and Crossroads model for live action mediator assessment:

- No mediator move is either competent or incompetent in and of itself.
- The competence of any mediator move depends upon:
  - The mediator's definition of "success"
  - The purpose of intervention
  - The context of prior interactions in the session
  - The impact on ongoing interactions
- Because "success" and the purpose of intervention are defined by the mediator's theoretical framework, the same moves that are competent under one theoretical framework (e.g., transformative mediation) may not be defined as competent under a different theoretical framework (e.g., problem-solving or facilitative mediation), and vice versa.
- "Signposts" will appear in the context of the unfolding interaction of a mediation session.
- The signposts mark crossroads for the mediator—different paths, or choices of moves, available to the mediator.
- The mediator's choice of which path to follow, when presented with the signpost event, reflects the mediator's theoretical framework (the mediator's definition of success and purpose for intervention).

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<sup>62</sup> Della Noce et al., *supra* note 4, at 1020–21.

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- A transformative mediator will choose the transformative path with some consistency.
- The mediator will be able to implement the mediator's choice with reasonable effectiveness.
- A transformative mediator will be able to critically reflect on the mediator's choices, their responsiveness to party moves, and their impact on ongoing interaction, and discuss those reflections with an assessor in appropriate terminology.

In the following section we provide an overview of how the assessment process works.

### **IV. AN OVERVIEW OF THE SIGNPOSTS AND CROSSROADS MODEL**

The Signposts and Crossroads model is organized in two parts. In Part 1, the assessor observes the performance of a mediator in session and analyzes the mediator's choices at particular signpost events. In Part 2, the assessor evaluates the mediator's understanding of the transformative framework and ability to apply it by analyzing the mediator's own descriptions and explanations of the mediator's practice. Here, the mediator's own voice is introduced into the assessment process through an interview between the assessor and the mediator. We discuss each of these aspects of the assessment process separately, but note that we consider both essential to thorough assessment of the competencies we set forth earlier in this article.

The process we describe presumes a well-trained assessor, who has undergone thorough education in the foundations of this process and how to recognize markers of competent transformative practice in the ongoing interaction of a mediation session. The assessor should be thoroughly familiar with the theory and practice of transformative mediation, able to recognize competent mediator moves in "real time," and able to engage in discussion with the mediator. Assessors are trained to look for the signpost events and pay close attention to the mediator's actions at the crossroads. The assessor thus can key in on specific aspects of the mediation, aspects that are particularly significant for competent transformative practice, and not feel the pressure—and fatigue—of trying to pay attention to everything. In addition, the limited number of signpost events and the specific description of appropriate paths at the crossroads provides for substantial consistency from assessor to assessor.

The assessor has three tasks: (1) to observe mediator practice in the course of a mediation session; (2) to assess whether the mediator is interacting consistently with the parties in ways that support the goals of

transformative mediation—fostering conflict transformation by supporting party efforts at empowerment and recognition; and (3) to communicate about that assessment with the mediator.

#### *A. Part 1: Analysis of Interaction in the Mediation Session*

In preparation for the assessment process, the assessor gathers the following materials: (1) the Signposts and Crossroads charts that are reproduced in Appendix A, and (2) several copies of the Assessor's Note-Taking Guide that is reproduced in Appendix B.

The assessor's task is to observe, closely and carefully, the unfolding interactions of all people in the mediation room and watch for signpost events in the interaction. The assessor records the details of communication between the mediator and the party or parties that are associated with these signpost events in the far left column of the Assessor's Note-Taking Guide. The assessor also notes the mediator's choice of move at this crossroad, and records it in the far right column of the Assessor's Note-Taking Guide. This continues throughout the mediation session.

There can be some concern with distinguishing one signpost event from another. It is important to remember that communication is multi-functional. That is, people can accomplish many things at one time with their communication. For example, "Hi. How are you today?" can function as a greeting, a request for attention, a request for information, and an attempt to relate in a particular way, all at once. Moreover, people generally speak in turns longer than a syllable or even a sentence. Thus, when people talk, it is sometimes difficult to "code" what they say as one thing, and not another. Many things can be happening, and those things can overlap in terms of neat categories. The "signposts" are functional categories, that is, the category assigned to a part of the conversation depends on the function it serves, that is, what is happening, or what the parties are "doing," in that part of the conversation. Functions, and therefore, categories, can and do sometimes overlap. This is not cause for alarm. The purpose of establishing these key signposts is to train assessors to "perk up their ears" when they occur, so they can note the interactions happening at that moment, and pay attention to how the mediator responds, if at all. What is important is that assessors "alert" at the signpost, and jot down what is happening (using party language as closely as possible) and how the mediator responds, then return to this later to evaluate which signpost it was and whether the mediator responded by following the transformative path or another path.

The process calls for a period of reflection for both the assessor and the mediator at the immediate conclusion of the mediation session. During this

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period, the mediator is asked to reflect on what went well and what may not have gone well for a later discussion. Meanwhile, the assessor goes over his or her notes so that very specific feedback may be given. The assessor examines each interaction the assessor has recorded on the Assessor's Note-Taking Guide. The assessor codes each signpost event, and then examines whether the mediator's response in that moment was appropriate, that is, whether the mediator chose the transformative path or a different path. The assessor must "group" each signpost event, that is, look at all of the "narrative" events and mediator responses together, all the "direct engagement" events and mediator responses together, et cetera, for every signpost group. Then, the assessor looks for patterns within each group. For example, was the mediator consistently competent in reflecting party narratives, but consistently at a loss for responding to direct party engagement that included conflict talk? The assessor evaluates mediator competence in responding within each signpost group, by asking whether the preponderance of moves made in response to each signpost event was consistent with the transformative framework.

Then, the assessor looks for the trend across all signpost groups. The assessor determines whether the overall pattern of mediator moves is fairly consistent with transformative practice, or reflects an overall choice to follow another path, by asking whether the preponderance of moves made in the mediation as a whole was consistent with the transformative framework. The assessor also determines whether, given faithfulness to the transformative framework, the mediator is generally making moves with a reasonable degree of skill or competence.

The assessor organizes this analysis for feedback to the mediator. The emphasis is on conceptual rather than chronological organization. The goal is not an instant replay of the entire mediation, but specific feedback regarding the pattern of mediator choices at the important crossroads. The assessor identifies several specific moments that support each point to be made, moments that include what was happening—as much party talk as possible—and what the mediator intervention was. The assessor stresses major points of feedback and ignores minor points—otherwise it is too easy for the mediator not to get the big picture of the feedback.

### *B. Part 2: The Assessment Conversation*

After the period for reflection, the assessor meets with the mediator. The assessor reminds the mediator that the goal of the assessment is to support the development of the mediator's practice. Then, the assessor engages in a conversation about specific events in the mediation session that the mediator

thought went well or did not go well. The assessor listens carefully to what the mediator identifies, since this provides important information about the mediator's understanding of the framework. For instance, if a mediator comments on how skillfully the mediator got the parties to an agreement or otherwise indicates that the mediator was particularly effective at moves that are inconsistent with transformative practice, the mediator may well be working from a different orientation. On the other hand, a mediator who talks about a party becoming clearer and more articulate, or about parties increasing their understanding of each other, is identifying as important things consistent with the transformative orientation.

The assessor adds observations, being as specific as possible and providing examples from the notes of specific moves and their context. The assessor follows the description by inviting the mediator to talk about the purpose behind the move: "What were you hoping to accomplish with that response?" Again, the assessor listens carefully to what the mediator says in response to determine whether or not the mediator's purpose was consistent with the transformative orientation. Where mediator moves are identified as inconsistent with the transformative framework, the assessor also discusses possible alternative interventions with the mediator. The process concludes with the assessor providing at most three specific areas for further development by the mediator.

### *C. Trustworthiness*

To be useful to the field and to the ISCT, the process set forth here must be trustworthy, a term which generally refers to reliability and validity, which are standards for assessing the quality of measurement tools. Reliability is "consistency of observation, labeling, or interpretation."<sup>63</sup> It is sometimes addressed by assessing how consistent the outcome is upon repeated administrations of the measuring instrument. In circumstances in which the instrument requires judgments by an observer, as is the case with the process described here, reliability is commonly assessed by evaluating consistency among different evaluators.<sup>64</sup> This is normally called inter-rater reliability. Validity refers to the extent to which a measuring instrument

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<sup>63</sup> RICHARD E. BOYATZIS, *TRANSFORMING QUALITATIVE INFORMATION: THEMATIC ANALYSIS AND CODE DEVELOPMENT* 144 (1998).

<sup>64</sup> See KILEM GWET, *HANDBOOK OF INTER-RATER RELIABILITY: HOW TO ESTIMATE THE LEVEL OF AGREEMENT BETWEEN TWO OR MULTIPLE RATERS* 11–12 (2001).



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actually assesses whatever it is intended to measure.<sup>65</sup> There are many different ways to assess validity, but generally it is evaluated by comparing outcomes from the measuring instrument with outcomes obtained by other means of assessing the same quality.<sup>66</sup> The process and outcome of our reliability and validity assessments are described below.

### 1. *Inter-Rater Reliability*

Each of us serves as a reviewer of videotaped mediations submitted by candidates for the designation of Certified Transformative Mediator.<sup>67</sup> The certification review involves extensive stop-action analysis of a half-hour taped mediation, evaluation of two brief self-reflective essays submitted by the mediator, and an interview with the mediator. The outcome of the evaluation is written feedback for the mediator that contains the certification decision and a list of two or three key areas for further development by the mediator. For the current inter-rater reliability assessment, two of the submitted videotapes were selected. Three of us (all but the assessor who conducted the original certification assessment) independently conducted a signposts/crossroads assessment of each tape. That is, the tape was played without stopping, as if it were a live mediation. The assessor followed the process described above, and, following the mediation, identified two specific areas for further development by the mediator, which is the concluding step of the signposts/crossroads model. Inter-rater reliability was assessed by comparing the independently determined areas for further development identified by the three assessors. The agreement among the assessors was remarkable. For each mediation, all three reviewers agreed on one of the two areas to work on (for one of the mediators it was to stop leading the parties and for the other it was increase use of summaries). For the second identified area, all but one recommendation was identified by two of the three assessors. This is particularly strong endorsement of the inter-rater reliability given the dozens of possible areas that could have been identified.<sup>68</sup>

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<sup>65</sup> EDWARD G. CARMINES & RICHARD A. ZELLER, RELIABILITY AND VALIDITY ASSESSMENT 17 (1979).

<sup>66</sup> *Id.* at 19.

<sup>67</sup> See Della Noce et al., *supra* note 4, for a complete description of the process.

<sup>68</sup> This value is not quantifiable because there was no set pre-defined list of possible areas for improvement. Assessors generated their lists based upon their own background and knowledge of transformative mediation and their observations of the mediator.

## 2. *Validity*

To assess validity the two identified areas for further development were compared to the areas for development identified as a result of the certification assessment. Thus, mediator competence as determined by watching a half-hour mediation without stopping was compared to competence as determined by other reviewers watching the same mediation who stopped the videotape frequently, interviewed the mediator, and read two brief self-assessment essays. Agreement, once again, was substantial. For one of the mediations, the certification assessor identified only one area for further development. Two of the three signpost/crossroads assessments identified that same area. For the other mediation, the certification assessor identified two areas for further work. One of these areas was also identified by all three signposts/crossroads assessors and the second area was identified by two out of three. This is solid evidence for the validity of the signposts/crossroads assessment method—assessment by both methods resulted in essentially the same outcome.

These analyses provide strong evidence that the process described here is both reliable and valid. Independent reviewers following the process reach similar conclusions (reliability) and assessment outcomes closely match those reached through a separate process of evaluating transformative mediator competence (validity).

## V. IMPLICATIONS

What we have presented here is a model for a performance-based formative assessment process for use in live action mediation sessions that is theoretically, empirically, and methodologically grounded, and therefore trustworthy. It is rigorous and systematic. We suggest that this model, while directly applicable only to transformative mediation, is instructive for the field as a whole.

Although the process was developed specifically for the assessment of transformative mediators, the basic concept is applicable to other forms of practice. It provides a replicable methodology for scholars and practitioners of other frameworks to develop theory-specific approaches to live action performance-based assessment methods that are grounded in research on the actual practices of mediators in that particular framework and are methodologically sound.

The key assumptions of the methodology are:

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1. An observer of a live mediation cannot attend to everything.
2. There are "diagnostic events or moments" during the mediation, determined by the theoretical orientation of the practice being assessed, that can serve as signposts for the assessor.
3. The signposts mark crossroads for the mediator. There will be choices for the mediator to make with respect to the mediator's intervention that will be deemed appropriate or not depending upon the theoretical orientation to practice being assessed.
4. The mediator's own description of interventions that were and were not in alignment with the theoretical orientation provides valuable information to the assessor.

This methodology demonstrates that valid and reliable performance-based assessment tests can be constructed, contrary to what appears to be a prevailing sentiment in the mediation field that the task is simply too difficult.<sup>69</sup> At the same time, this methodology presents a challenge to the field by framing the fundamental importance of theoretical, empirical, and methodological grounding for future efforts to create performance-based assessment tests. Each of these dimensions has proven somewhat problematic for the field.

First, a recurrent criticism of the mediation field is its lack of theoretical grounding.<sup>70</sup> Yet, before scholars and practitioners can create rigorous and systematic performance-based assessment methods, they must be able to articulate the theoretical framework they are using, the definition of mediator success in that framework, and the parameters of "good" practice given that definition. In the current climate of the mediation field, with its marked tendency to present the field as a monolithic entity and practice as generic and neutral in terms of theoretical frameworks, articulation of theoretical frameworks presents a serious challenge to the status quo.<sup>71</sup>

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<sup>69</sup> See, e.g., ACR Mediator Certification Task Force, Report and Recommendations to the ACR Board of Directors (Mar. 31, 2004), <http://www.acrnet.org/about/taskforces/certification.htm> (last visited Nov. 1, 2007).

<sup>70</sup> Joseph A. Scimecca, *Theory and Alternative Dispute Resolution: A Contradiction in Terms?*, in CONFLICT RESOLUTION THEORY AND PRACTICE: INTEGRATION AND APPLICATION 211, 211–17 (Dennis J.D. Sandole & Hugo van der Merwe eds., 1993).

<sup>71</sup> See Bush, *supra* note 1; Della Noce, *supra* note 1. A vivid example of this tendency is provided by the ACR Task Force on Mediator Certification: Initial Report, which purports to aspire to a process that is "style neutral." See Association for Conflict Resolution, ACR Task Force on Mediator Certification: Initial Report (on file with author).

Second, the field as a whole, and policymakers in particular, has shown reluctance to draw upon insights from empirical research to enlighten practice and policy. This may be because insights from empirical research have tended to challenge the prevailing mythologies of mediation practice.<sup>72</sup> Nonetheless, our work highlights the importance of drawing upon empirical research about what mediators actually do in order to construct assessment processes. At the same time, empirical research in the mediation field deserves renewed attention as theoretical frameworks develop and comparative studies become more feasible.<sup>73</sup>

Finally, the need for methodological grounding in mediator assessment initiatives suggests the importance of collaborations between practitioners, policymakers, and scholars who can construct and execute valid and reliable research, an approach that has not always been encouraged in the past.<sup>74</sup>

Despite these considerable challenges, it is our hope that this Signposts and Crossroads Model will stimulate greater theoretical, empirical, and methodological rigor in the field. The field as a whole can only benefit from greater clarity regarding the nature of good mediation practice and the sources of diverse views on what that means.

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<sup>72</sup> See, e.g., Della Noce et al., *supra* note 4, at notes 53–54, and accompanying text.

<sup>73</sup> See, e.g., Della Noce, *supra* note 15.

<sup>74</sup> See, e.g., Linda C. Neilson & Peggy English, *The Role of Interest-Based Facilitation in Designing Accreditation Standards: The Canadian Experience*, 18 MEDIATION Q. 221, 223 (2001) (arguing that scholars and academics who merely think about mediation practice would make no useful contribution to the development of assessment standards).

# A MODEL FOR LIVE ACTION MEDIATOR ASSESSMENT

## Appendix A

SIGNPOST: OPENING THE SESSION	
Transformative Framework	Other Frameworks
<p><b>Using a metaphor of conversation to describe mediation, the mediator's role, or the party's role</b></p> <ul style="list-style-type: none"> <li>• Conversation between the parties</li> <li>• Related terms: discussion, talk, chat, etc . . .</li> </ul> <p><b>Identifying inherent constructive possibilities in having a conversation, such as:</b></p> <ul style="list-style-type: none"> <li>• Talking over differences</li> <li>• Increasing clarity and understanding</li> <li>• Hearing new information</li> <li>• Being heard by the other</li> <li>• Seeing choices</li> <li>• Making decisions</li> </ul> <p><b>More "you-talk" than "I-talk"</b></p> <p><b>Downgrading mediator agency, e.g.:</b></p> <ul style="list-style-type: none"> <li>• Emphasizing role as "helping" or "assisting"</li> <li>• Disclaiming power to decide</li> </ul>	<p>Using metaphors that suggest that the outcome is more important than the conversation itself, such as:</p> <ul style="list-style-type: none"> <li>• Negotiation</li> <li>• Settlement</li> <li>• Problem-solving</li> <li>• Problem and solution</li> </ul> <p>A focus on agreement as the definition of success</p> <p>More "I-talk" than "you-talk"</p> <p>Using metaphors that disempower the parties by positioning the mediator as an authority figure or expert (i.e., upgrading mediator agency), such as:</p> <ul style="list-style-type: none"> <li>• Referring to mediation as a "hearing"</li> <li>• Referring to parties as plaintiffs and defendants</li> <li>• Using unnecessary legal terms</li> <li>• Referring to the legal, therapeutic, or substantive expertise of the mediator</li> <li>• Assuming an analytical stance "above" the parties</li> </ul>

## Appendix A

SIGNPOST: A PARTY NARRATIVE	
Transformative Framework	Other Frameworks
<p><b>Pro-active listening</b></p> <p><b>Using minimal encouragers at party pauses to encourage a party to continue speaking ("Mm-hmm," "Go on," "Okay")</b></p> <p><b>Using reflections that "follow" the content and emotional tone of a party's own comments</b></p> <p><b>Offering reflections in a tentative manner that invites the party to correct the mediator (known as "open reflections"), especially by using "check ins" at the end and/or ending with an opening, questioning tone</b></p>	<p>Reframing</p> <p>Normalizing</p> <p>Mutualizing</p> <p>Future focus</p>

# A MODEL FOR LIVE ACTION MEDIATOR ASSESSMENT

## Appendix A

SIGNPOST: ATTEMPTS AT DIRECT PARTY-TO-PARTY ENGAGEMENT	
Transformative Framework	Other Frameworks
<p><b>Pro-active listening</b></p> <p><b>Allowing significant segments of uninterrupted party-to-party talk ("intentional silence")</b></p> <p><b>"Following" party-to-party discussions with inclusive summaries</b></p> <ul style="list-style-type: none"> <li>• <b>Include important topics raised by both/all parties</b></li> <li>• <b>Include the emotional tone of what was said</b></li> <li>• <b>Include points of disagreement as well as agreement</b></li> <li>• <b>Include the intangible as well as the tangible</b></li> </ul>	<p>Focusing party attention on the mediator and away from each other</p> <p>Focusing party attention on "the problem" and away from each other</p> <p>Discouraging party efforts at party-to-party talk through:</p> <ul style="list-style-type: none"> <li>• Ground rules</li> <li>• Use of caucus</li> <li>• Ignoring a party who is trying to engage</li> <li>• Non-verbal behaviors that "cut off" a party</li> </ul> <p>Stopping party-to-party talk when it happens, through:</p> <ul style="list-style-type: none"> <li>• "Turn shifts" (changing who may speak next)</li> <li>• "Topic shifts" (changing the subject)</li> <li>• Use of caucus</li> <li>• Interruptions</li> <li>• Specific "sanctions" (e.g., "speak for yourself" or "speak to me")</li> </ul>

## Appendix A

SIGNPOST: "CONFLICT TALK"	
Transformative Framework	Other Frameworks
<p><b>Allowing conflict talk to happen</b></p> <p>"Following the heat" by using key word encouragers, that is, keying in to a term a party used that seems to carry "heat"</p> <p>"Following the heat" by using reflection or summary, as appropriate, to:</p> <ul style="list-style-type: none"> <li>• "Follow" the content and emotional tone of party conflict talk</li> <li>• Mark points of disagreement (not just agreement or common ground)</li> <li>• Allow multiple themes / storylines to develop in the course of conversation (not just themes that seem tangible, or solvable)</li> </ul> <p>"Following the heat" by asking questions that invite elaboration of conflict storylines</p>	<p>Preventing conflict talk in advance through ground rules that limit:</p> <ul style="list-style-type: none"> <li>• How long a party may talk</li> <li>• How parties may talk</li> <li>• What parties may talk about</li> </ul> <p>"Extinguishing the heat" when conflict talk occurs, through:</p> <ul style="list-style-type: none"> <li>• Turn shifts (changing the speaker)</li> <li>• Topic shifts (changing the subject)</li> <li>• Breaks</li> <li>• Calling for caucus</li> <li>• Imposing specific sanctions</li> <li>• Laundering out the emotion in reflections and summaries</li> <li>• Normalizing</li> <li>• Mutualizing</li> <li>• Reframing</li> <li>• Future focus</li> </ul>



# A MODEL FOR LIVE ACTION MEDIATOR ASSESSMENT

## Appendix A

SIGNPOST: PROCESS CHOICE POINTS	
Transformative Framework	Other Frameworks
<p><b>Highlighting process choice points that appear as direct party requests</b></p> <p><b>Highlighting process choice points that are implied in party questions about or objections to any aspect of the process</b></p> <p><b>Including process choice points in their summaries and reflections, if noted or implied by the parties</b></p> <p><b>Offering decision-points to the parties ("Checking in")</b></p> <p><b>Offering any mediator suggestions only tentatively, and often with alternatives, in order to emphasize opportunity for party choice</b></p>	<p>Making choices for the parties (e.g., "The mediator controls the process, and the parties control outcome")</p> <p>Taking choices away from the parties</p> <p>Limiting the choices/topics available for discussion</p> <p>Narrowing the topics for discussion</p> <p>Favoring certain choices over others</p> <p>"Closing" (disregarding unresolved topics as agreement begins to appear)</p> <p>Orchestrating or managing the parties' interactions</p>

## Appendix B

### ASSESSOR'S NOTE-TAKING GUIDE

This Guide is organized to show the 5 "signposts" on the far right, to help refresh your memory.

**PARTY TALK    (SIGNPOST)    MEDIATOR TALK**

<b>REMINDER: SIGNPOSTS</b>
<b>OP</b>
<b>PN</b>
<b>DE</b>
<b>CT</b>
<b>PC</b>